Weco Cleaning Specialists, Inc. *and* Local 32B-32J, Service Employees International Union, AFL–CIO and Amalgamated Local Union 355, Party in Interest. Case 29–CA–14226

August 19, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 29, 1991, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order.

The judge found that the General Counsel had made out a prima facie case for finding that the Respondent refused to hire its predecessor's employees in order to avoid an obligation to recognize and bargain with the Union. In so finding, the judge relied in part on the affidavit of Francisco ''Frank'' Cruz, the project manager for the Respondent's predecessor who was the Respondent's agent at the time it did its initial hiring and took over maintenance operations at the facility and who was deceased at the time of the hearing. We find that the General Counsel made out a prima facie case of a violation i.e., a showing sufficient to support the inference that union animus was a motivating factor in its refusal to hire the predessor's employees, *Wright Line*, 251 NLRB 1083, 1089 (1990), even without consideration of the Cruz affidavit.[2]

Thus, in agreement with the judge, we rely on evidence of animus seen in the Respondent's course of conduct toward the Union. Specifically, after the meeting between the Respondent's president and vice president, Norma and Alphonse Edwards, and union representatives in December 1988, more fully described by the judge, the Respondent never got back to Union official McCulloch despite telling McCulloch it would do so. Similarly, the Respondent ignored McCulloch's letter following up the December meeting in which he asked to be kept informed regarding the status of the Respondent's contract with the Small Business Administration. On June 27, 1989,[3] McCulloch contacted the Respondent when he heard of the Respondent's impending takeover of the building maintenance operations. At that time, McCulloch once again asked the Respondent to hire its predecessor's unit employees. Norma Edwards replied that she had not yet made up her mind and mentioned something about applications. Edwards never got back to McCulloch before starting operations on July 3 at the facility, but required that the A to Z employees fill out applications, which she concededly never picked up from Cruz. Several days later, according to their credited testimony, three A to Z employees were told by Cruz that they had been selected for employment by the Respondent but that the Respondent was not taking a majority of its work force from the former A to Z employees because it did not want the Union. In sum, we agree with the judge's conclusion based on this evidence that the Respondent's entire course of conduct reflected its desire to avoid dealing with the Union as the representative of the employees in question.

We also rely on evidence of the Respondent's hiring practices to find that the General Counsel has established a prima facie case of discriminatory motivation.[4] As the judge noted, the Respondent admitted it was impressed with the A to Z employees' work when it first visited the facility and told McCulloch at the December meeting that it had no problems with the employees and would hire them, although it did not wish to hire the entire A to Z employee complement. However, the Respondent ultimately determined it would hire only six of the A to Z employees. In this regard, the Respondent presented no evidence as to how the Edwardses came to the decision to hire only six of the A to Z employees or of any critical information that justified its failure to hire the employees.[5]

[1] The General Counsel moved to strike portions of the Respondent's brief in support of its exceptions. We deny the General Counsel's motion to strike.

[2] We do rely on the testimony of the former A to Z employees concerning statements made by Cruz to them because we adopt the judge's finding, for the reasons stated by him, that Cruz was the Respondent's agent at the time such statements were made and thus these statements by Cruz were admissions against interest, as further found by the judge.

[3] All dates are in 1989 unless otherwise indicated.

[4] We note in this connection that the Board has held that a prima facie case of discriminatory motivation may be supported by consideration of the lack of any legitimate basis for a respondent's actions. *Wright Line*, 251 NLRB 1083, 1088 fn. 12 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 959 (1982), approved *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966); *Southwest Distributing Co.*, 301 NLRB 954 (1991), and *Active Transportation*, 296 NLRB 431 (1989). We view this as consistent with the Second Circuit's recent refinement of its opinion in *Holo-Krome Co. v. NLRB*, 947 F.2d 588 (1991). On the Board's petition for rehearing in *Holo-Krome*, the court held, inter alia, that ''[w]hen the Board reviews an ALJ's decision, and when a court of appeals reviews a Board's decision, the reviewing bodies should be able to examine the entire record to determine if improper motivation has been shown . . . .'' 139 LRRM 2353 (1992).

[5] Moreover, the Edwardses testified to shifting reasons for the Respondent's failure to contact or hire the former A to Z employees. Although the Respondent contends that it was willing to hire six em-

Further, despite the Respondent's assertion that it began operations on July 3 with 10 of its own employees, the judge found that 2 of the employees brought by the Respondent to the facility were hired off the street with no office cleaning experience, 1 was a secretary, 4 were relatives of the Edwardses transferred from other jobs who then had to be replaced at their original locations, and 2 were students who were only temporary employees. (There was no exception to this finding.) Thus, contrary to its assertion, the Respondent did not have an initial work force ready to staff its new operation at the facility. Moreover, as the judge found, the Respondent continued to hire employees through December, including inexperienced workers, in fact conceding that it hired everyone who applied for jobs at the facility except project manager applicants and former A to Z employees.

The Respondent's treatment of the former A to Z employees in October further evidenced unlawful intent. It sent letters to the A to Z employees who had applied for jobs with the Respondent in June, but then required those former employees to fill out second applications and come to the Edwardses' home for interviews. There is no evidence that any other job applicants were required to go through such elaborate procedures. More significantly, although it purported to offer jobs to the former A to Z employees in October, it was clear that no such jobs were available to them. Although the Respondent sought to justify this by contending that it would offer jobs to the employees when its request to clean more space was approved, the Respondent did not dispute the judge's finding that it continued to hire outside employees between October and November, including some inexperienced workers, without resort to any of the former A to Z employees for whom it had twice received job applications.[6]

In sum, we find that there is ample evidence on the record apart from the Cruz affidavit supporting the judge's finding that there was a prima facie case of unlawful conduct.[7] We further agree with the judge's conclusion that the Respondent has not rebutted the General Counsel's prima facie case by establishing that it would not have hired the former A to Z employees even without their union affiliation. Thus, whether or not we consider the Cruz affidavit, we agree with the judge that the Respondent's refusal to hire the employees at issue was part of its plan to avoid an obligation to recognize and bargain with the Union and thereby violated Section 8(a)(3) and (1) of the Act.

ployees on July 3, it is clear from the judge's finding, which we adopt here, that their employment essentially was conditioned on the employees' abandonment of their union representation. This is an unlawful condition which employees are not required to accept. *City Electric*, 288 NLRB 443, 453–455 (1988), and *A-1 Schmidlin Plumbing Co*., 284 NLRB 1506 (1987), enfd. 865 F.2d 1268 (6th Cir. 1989).

[6] The Respondent did, because of his specialized experience, hire a former A to Z employee in October who had not filled out a second job application.

[7] As set forth above, we have found a prima facie case without regard to the Cruz affidavit. Additionally, we agree with the judge's ruling admitting the affidavit because it is corroborated by the evidence discussed above. We further find that, although the affidavit supports a prima facie showing of a violation, it is entitled to less weight than that accorded it by the judge.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Weco Cleaning Specialists, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

David S. Cohen, Esq., for the General Counsel.
Norma Edwards, President, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed by Local 32B-32J, Service Employees International Union, AFL–CIO (the Union or Local 32B-32J), the Regional Director for Region 29 issued a complaint and notice of hearing on November 8, 1989,[1] alleging that Weco Cleaning Specialists, Inc. (Respondent) violated Section 8(a)(1), (3), and (5) of the Act.

The trial with respect to the issues raised by the complaint was heard before me in Brooklyn, New York, on March 29 and 30, 1990. The complaint was amended at the hearing.

Subsequently, briefs were filed by Respondent and General Counsel. Respondent's brief was accompanied by 17 documents marked as ''Appendices,'' 1 through 17. General Counsel thereafter made a motion to strike the ''appendices'' from the record as well as substantial portions of Respondent's brief, on the grounds that these portions of the record, as well as the appendices do not appear in the record and were not presented at trial.

Respondent then filed a response to General Counsel's motion, and attached thereto, three additional appendices. This resulted in another request by General Counsel to strike these three appendices, plus additional portions of Respondent's response, again on the grounds that neither the appendices nor the portions of the response, were reflective of any record testimony.

Respondent filed an additional response to this request of General Counsel, which resulted in one more letter from each party, dealing with the issue of Respondent's brief and the appendices.

A substantial reason for the above-described deluge of documents is of course Respondent's decision not to retain an attorney for the trial in these proceedings, and to be represented by Norma Edwards, its president. I would note that at the outset of the trial, I cautioned her about the difficulty of representing herself in such a trial, and that neither counsel for General Counsel nor myself would act as her attor-

[1] All dates hereinafter are in 1989, unless otherwise indicated.

ney. I emphasized that such is the representative of Respondent would be required to present whatever witnesses and evidence that Respondent wishes to present, and that after General Counsel rests she will have an opportunity to present whatever witnesses Respondent may have. I also informed her that evidence must be presented through testimony on the stand by witnesses and on the record. I would also note that Respondent, and its counsel at the time was served with a copy of the standard procedures in formal hearings, along with the complaint. This document states, inter alia, that exhibits offered in evidence, subject to certain exhibits not relevant here, must be submitted before the close of the hearing.

General Counsel is quite correct that none of the appendices that Respondent attached to its brief and response, except for Appendix 11, were ever authenticated, or introduced into the record by Respondent during the course of the hearing. Nor does an examination of these documents reveal, nor does Respondent contend that these appendices were previously unavailable or newly discovered.

Respondent argues, however, that it believed that when the time was set for submission of briefs, this included the opportunities to submit additional documentation in support of its assertions. Respondent also contends that General Counsel had been provided with most of the appendices by Respondent, as a result of Respondent complying with General Counsel's subpoena. Finally, Respondent contends that others of the document were not presented, because the issues involved only come up at the last day of the hearing.

I do not find that any of Respondent's arguments, either singly or collectively are sufficient to justify Respondent's failure to comply with the well established Board requirement that absent newly discovered, or previously unavailable evidence (or agreement of the parties) all evidence including exhibits must be introduced into the record prior to the close of the hearing.

Respondent's contention that since General Counsel had some of these exhibits in his possession, permits the late introduction of the evidence, and/or that General Counsel had an obligation to submit these documents, are without merit. There is no obligation on General Counsel to introduce any evidence favorable to Respondent, and indeed I specifically informed Respondent at the trial that neither I nor General Counsel would act as Respondent's attorney, and it was Respondent's obligation to present any evidence in support of its position through and by testimony on the witness stand.

While I believe that Respondent is sincere in its assertion that it thought it could present these documents with its brief, I find that my statements in the record, as well as the statements of procedure which was served on Respondent, were sufficient to alert Respondent that these ''appendices'' should have been submitted during the trial.

The further argument of Respondent that matters relating to some of documents arose only at the last day of trial, is also an insufficient excuse. Respondent made no request for an adjournment to present this additional evidence, that it was not aware it needed to present until the last day of trial. Nor did Respondent request that the record be kept open for the receipt of this evidence. Indeed Respondent failed to even mention that it wished to present these additional documents prior to the close of the hearing.

These problems are largely due to Respondent's decision not to hire an attorney to represent it, and have resulted in Respondent having to ''suffer whatever consequences'' that may arise from such decision, as I warned Respondent about prior at the commencement of the trial.

Accordingly, based on the foregoing, I shall grant General Counsel's motion to strike from the record these appendices, and I shall disregard them. *EDP Computer Systems*, 284 NLRB 1286, 1287 (1984), and cases cited therein.[2]

With respect to General Counsel's motion to strike certain portions of Respondent's brief and its response to General Counsel's motion, I would argue that many of the items referred to in General Counsel's motion contain no record support. However, other portions referred to, in my view could be construed as merely interpretations or conclusions drawn from record testimony. Rather than specifically discuss each item referred to, and decide which of the categories such items fall within, it is more appropriate to conserve judicial economy, to simply deny General Counsel's motion in connection with striking portions of the brief and responses. Having done so however, I shall of course, consistent with Board rules and precedent, make my findings here heard solely on record testimony or exhibits. Thus, I shall disregard and not consider any portions of Respondent's brief and response, which recites facts that are not included in the record. *EDP* supra at 1288.

Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a New York corporation with its principal office and place of business located at 144–57 175 St., Springfield Gardens, Queens, New York, and has been engaged in providing cleaning and maintenance services to residential, commercial, and governmental customers located throughout the State of New York, including the General Service Administration, a United States Government agency, at a facility located at 830 Third Avenue, Brooklyn, New York (the Third Avenue facility).

During the past year, Respondent in the course and conduct of its operations, performed services valued in excess of $50,000 for United States Government agencies located in the State of New York, including the General Services Administration, and the United States Army Reserve, each of which enterprises in turn directly engaged in interstate commerce and meets a Board standard for the assertion of jurisdiction exclusive of indirect inflow and indirect outflow.

The operations of Respondent have a substantial impact on the material defense of the United States.

It is admitted, and I find, that Respondent is now and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I find, that the Union and Amalgamated Local Union 355 (Local 355) are now and have

[2] I would note, however, that in view of the possible misunderstanding by Respondent, that I have reviewed these appendices and conclude that even had I considered them as part of the record, my ultimate decision would not have been changed.

been at all times material, labor organizations within the meaning of Section 2(5) of the Act.

II. FACTS

Since 1974, Local 32B-32J has been the collective-bargaining representative for employees performing building maintenance services at a Federal building located at 830 Third Avenue, Brooklyn, New York, who were employed by various contractors who received bids to perform this work. Each of these contractors when they commenced performing the maintenance services at this facility, hired the employees of the prior contractor, agreed to recognize the Union, and executed collective-bargaining agreements with the Union. A to Z Maintenance Corp. (A to Z), had received a subcontract from the Small Business Administration (SBA), the prime contractor, which in turn had contracted with the General Services Administration (GSA) on behalf of the United States Government for the performance of these services at that location.

A to Z had performed this work since 1982 or 1983, and like the prior contractors, agreed to recognize Local 32B-32J and sign contracts with them. The most recent such contract was effective from January 1, 1987, to December 31, 1989.

A to Z was responsible for cleaning, including shipping, dusting, stripping, waxing floors, and washing blinds in the several areas at the Federal building, including space occupied by the Coast Guard, Federal Drug Administration, Customs, and other Federal agencies, plus cleaning responsibilities outside the building.

As of June 1989, A to Z employed Francisco ''Frank'' Cruz as its project manager in charge of the general supervision of its work at the Third Avenue facility. A to Z employed 21 employees at that time who were covered by the collective-bargaining agreement with the Union. These employees include Tyrone Bugg (day supervisor), Michael Kypri (night supervisor), Myra Maldanado (secretary to Cruz), John Boyne (elevator operator), and Miguel Minier, Luis Gomez, Martha Benitez, Earline Bridgeman, Henry Carner, Elizabeth Gorden, Arnie Hughes, Willie Colbert, Ruben Gonzalez, Michelle Chillo, Guiomar Alzate, Michael Montalbano, Joseph Ditonno, Eduardo Torres, Sal Zampella, Esther ''Violetta'' Laurano, and Frank Olivieri[3] (General Workers).

In November 1988, SBA offered Respondent a set-aside contract to perform maintenance services at the Third Avenue facility. Apparently, the starting date for Respondent to take over was not finalized at that time, nor was any definite decision made. The specifications given to Respondent at that time however, did provide that it would not be required to clean the same amount of space that A to Z was required to clean.

On several occasions between November 1988 and June 1989, Norma and Alphonse Edwards, Respondent's president and vice president, visited the facility, and spoke with the owners of A to Z, as well as with Cruz. The Edwardses toured the facility with Cruz and admitted that they were very impressed with how well the building had been cleaned, and were very impressed with Cruz' knowledge of the maintenance industry. During these visits, the Edwardses measured and familiarized themselves with the spaces that Respondent would have to clean. At about the same time, Norma Edwards offered to retain Cruz as project manager, when Respondent commenced cleaning the facility. Cruz agreed, but final details of his employment relationship had not been finalized. Edwards told Cruz that as a result of the reduction in space that Respondent would be expected service; she would not need to hire the same number of employees that A to Z employed.

Meanwhile, between November 1988 and June 1989, negotiations continued between Respondent, GSA, and SBA concerning the contract for the cleaning of the space at the Third Avenue facility.

During one of their visits to the facility, in November or December, Cruz introduced the Edwardses to Union Business Agent Tony Poccio, who suggested that they meet with Poccio's superiors at the Union. They agreed to the meeting, which was held at the Union's offices in mid-December 1988. The Edwardses met with Kevin McCulloch, assistant to the president and Donald Maimm, vice president of the Union. McCulloch told the Edwardses that the Union represented the employees employed at the facility, and requested that Respondent hire the current work force should it be awarded the contract. He added that the Union would be willing to negotiate a contract from scratch if Respondent wished, or Respondent could sign the standard industry contract, to which A to Z was a party. McCulloch gave Norma Edwards a blank copy of the contract to review, and an ''application'' which the Union requests that signatories to contracts with it fill out.

Norma Edwards responded that she had no problem with hiring the current employees, and added that she would maintain the current level of benefits. However, he informed the union representatives that GSA specifications had changed, and that she did not believe that she would be able to hire all the employees previously employed by A to Z.

McCulloch replied that if the Union's standard agreement requires written permission from the Union before a reduction of staff is permitted, he advised Edwards not to make a bid for the job based on reduced staffing levels, because it would be difficult to obtain the Union's permission to do so. No specific number of employees was mentioned by either Respondent or by the Union.

McCulloch asked Edwards if Respondent had a contract with another union. Edwards replied that Respondent did not have such a contract, but that it contributed to the medical plan of Local 355 for its employees, because it is cheaper to provide insurance through such plan. McCulloch also asked Edwards if Respondent had any other work in New York and Edwards responded that she employed service employees at West Point.

The meeting ended with Edwards advising McCulloch that she would review the proposed contract and get back to him.

On January 18, 1989, McCulloch wrote a letter to Respondent in which he confirmed that at the December meeting, Respondent had disclosed that its employees were covered by the Local 355 medical fund. McCulloch attached a copy of a daily labor reports summary of a court order obtained by the Department of Labor, requiring the removal of the fiduciaries of the Local 355 welfare fund, and other penalties against the fund. The letter also requested that Re-

[3] The status of Olivieri is uncertain. While he was not physically working for A to Z as of June 30, the record indicates that he was either out on disability or had retired by that time.

spondent advise the Union with regard to the status of the Federal building at 830 Third Avenue. The Union received no reply from Respondent to this letter.

On or about June 7, GSA informed Respondent that it should be prepared to commence work at the facility on July 3, 1989, under an interim contract basis. On June 10, as a result of continuing negotiations, a 1-month interim contract was entered into between GSA, SBA, and Respondent to perform cleaning services at the facility. At that point, Respondent began to consider how to hire employees to service the facility, and at that point was admittedly in a rush to staff its operations.

During this period of time, Norma Edwards confirmed her prior agreement to hire Cruz as project manager, although again no final details had been worked out. Edwards told Cruz to select the six A to Z employees who he felt were the best workers, to be retained when Respondent took over the contract on July 3. Edwards informed Cruz that she was keeping only six employees, because she was going to get rid of Local 32B, that she had done this before, and she knew she could get away with it. She added that Cruz should keep all his ''papers'' on the other employees so that she use them in court to prove that the other employees were no good.

Shortly thereafter, Cruz gave Edwards the names of the six employees whom he selected for hire by Respondent (Kypri, Maldanado, Bugg, Minier, Laurano, and Torres). Edwards informed Cruz that the wages and benefits of these employees would remain the same, but no Local 32B. She added that she had her own union, but she refused to tell Cruz the name. Finally, Edwards told Cruz that the employees would start with the same new seniority date.

Cruz then informed employee Benitez in the presence of Maldonado, that he (Cruz) had just finished a conversation with Edwards, in which she had informed Cruz that she was only going to hire six A to Z employees,[4] and that she did not want the Union. Cruz also told employees Minier and Bugg that A to Z had lost the contract and that Respondent would be the new contractor. Cruz added that the new owner did not plan to keep the Union, but that she would give the employees the same benefits and wages but without the Union. Cruz also told the employees that Respondent had ''done it before,'' explaining that at other facilities where Respondent took over, it had refused to accept the union that represented the previous contractor.

On June 27, McCulloch learned from one of his agents that Respondent was about to start work at the facility. He immediately called Respondent and asked Norma Edwards if it was true that she was starting work shortly. Edwards replied that she would be commencing work in early July. McCulloch told her that he was taken aback because she had promised to get back to him when the contract became finalized. McCulloch asked Edwards to hire ''his people,'' i.e., the employees that were employed by A to Z. Edwards replied that she had not made up her mind yet, and mentioned something about applications.

With respect to applications, Edwards initially told Cruz that she would force the A to Z employees to come to her office, which is located at her residence (in Queens) to fill out job applications, in order to make it as difficult as possible for the current employees to apply. After a brief discussion, Edwards told Cruz that she did not want the employees to know where she lived, so she decided to hand out applications herself to the A to Z employees at the facility.

Thus, on June 27 (the same day of her conversation with McCulloch), Norma Edwards went to the A to Z office at the Third Avenue facility. She asked Cruz to call each of the A to Z employees that were present on that day to come into the office one at a time. When the employees came into the office, in the presence of Cruz, Edwards, and Maldonado, they were given applications to fill out for possible employment by Respondent. They were told to complete the applications and return them to Cruz by June 29.[5] Over the next 2 days, 15 A to Z employees submitted applications to Cruz, dated either June 27 or 28.[6]

While Edwards was supposed to send someone over to the facility on June 29 to pick up the completed applications from Cruz, no one came. After a series of misunderstandings between Cruz and Edwards, it was finally agreed to that he would give Edwards the applications on Monday, July 3, the first day of work for Respondent at the facility.

On June 29, in the afternoon, Cruz called Bugg into the office. Cruz informed Bugg that he had chosen, as per Edwards' instructions, six employees to be hired by Respondent. He told Bugg that Bugg had been selected, along with Maldanado, Minier, Laurano, Kypri, and Torres. Cruz added that Edwards intended to set up a ''voting system.'' She, according to Cruz, would bring in seven or eight of ''her own people'' who would vote for Local 355, and the former A to Z employees, who would vote for Local 32B-32J would be outvoted. Cruz added that he still had the completed applications, and that the Edwardses were supposed to pick them up, but they hadn't done so as yet. Cruz further informed Bugg that he would be contacting Edwards so Respondent could pick up the application from him on the weekend.

On Friday, June 30, A to Z employees Torres and Minier informed Cruz that they would not accept Respondent's offer of hire. Minier informed Cruz that he didn't like the idea that more senior employees than he had not been selected, and Torres told Cruz that he would not work for Respondent because he had worked for Respondent previously and was not treated well.

The above description of events prior to July 3, is derived from a compilation of the credited portions of the testimony of Norman and Alphonse Edwards, Bugg, Minier, Benitez, McCulloch, and the affidavit of Francisco Cruz.

With respect to the affidavit of Cruz, he was deceased at the time of the hearing, so General Counsel pursuant to Section 804(b)(5) of the Federal Rules of Evidence sought the introduction of a pretrial affidavit given by Cruz to Ira Sturm, Esquire, counsel for Local 32B-32J on July 14. In this connection, Sturm testified that he was previously employed by the Regional Office of the National Labor Relations Board from 1976 to 1980, as a trial attorney. As part of his responsibilities in that position, Sturm was called on

[4] Cruz had in December 1988, informed Benitez that Respondent would be taking over the contract from A to Z.

[5] Applications were distributed to approximately 19 employees. Employees Carner and Alzate were on vacation at the time.

[6] The employees who submitted applications were Benitez, Boyne, Bridgeman, Bugg, Chillo, Colbert, Ditonno, Gomez, Gorden, Hughes, Kypri, Maldonado, Minier, Montalbano, and Zampella.

to take affidavits from numerous witnesses, as many as hundreds of such affidavits over the course of his employment at the Board. Sturm credibly testified that essentially he utilized the same procedures and practices that he used while employed at the Board in taking the affidavit from Cruz on July 14.

Respondent objected to the introduction into evidence of the affidavit, on the grounds that it could not cross-examine the witness. I received the document, subject to further consideration, particularly as to the question of the ''equivalent circumstantial guarantees of trustworthiness'' as to this affidavit.

The Board has consistently viewed that this requirement of Section 804(b)(5) has been met by an affidavit taken by a Board agent. *Colonna's Shipyard*, 293 NLRB 136 (1989); *Auto Workers Local 259 (Atherton Cadillac)*, 259 NLRB 276, 280 (1985); *Canterbury Gardens*, 238 NLRB 864, 868 (1978); *Prestige Bedding*, 212 NLRB 690, 701 (1974).

The Board generally receives such documents in evidence,[7] while cautioning that such evidence ''must be evaluated with maximum caution, only be relied upon if and when consistent with extraneous, objective, and unquestionable facts.'' *Industrial Waste Service*, 268 NLRB 1180 (1984); *United Sanitation Service*, 262 NLRB 1369, 1374 (1982). *Custom Coated Products*, 245 NLRB 33, 35 (1979); *Colonna's Shipyard*, supra.

I questioned at the hearing whether the ''equivalent circumstantial guarantees of trustworthiness'' that the Board attaches to an affidavit taken by a Board agent, also is applicable to an affidavit taken by a charging party, as here, who is clearly not a neutral person taking the affidavit as is a Board agent in the process of investigating a charge. In *Doral Building*, supra, the Board did affirm a decision of an administrative law judge who applied Section 804(b)(5) to an affidavit taken by an interested party, albeit with no discussion or apparent consideration of the issue which I have raised. Nonetheless, although *Doral*, supra, in my view is of limited authority in support of the proposition that an affidavit taken by an interested party is admissible under Section 804(b)(5),[8] I shall reaffirm my decision at the trial to receive the affidavit of Cruz into evidence. I would note in this regard the testimony of Sturm, whom I found to be a believable and candid witness, who related his extensive previous experience as a Board agent. Thus, Sturm's credited testimony that he utilized substantially the same procedures and practices in taking the affidavit of Cruz, as he did when taking affidavits as a Board agent, convinces me that the requirement of ''equivalent guarantees of trustworthiness'' has been met with respect to this affidavit, and I shall receive it in evidence. *Doral Building*, supra.

This conclusion does not end the inquiry, for an even more serious question is presented, as to what weight should be given to the statements appearing in Cruz' affidavit, more specifically whether they are ''consistent and extraneous, objective and unquestionable facts.'' *United Sanitation*, supra; *Custom Coated*, supra. I am persuaded that sufficient corroboration and consistency with other facts of Cruz' assertions exists in the record, to permit me to place some reliance on his affidavit. Thus, I note that the statements that Cruz attributes to Edwards are completely consistent with and corroborated by the testimony of employees Minier, Benitez, and Bugg, that Cruz informed them about Respondent's intentions at about the same time that Norma Edwards made similar remarks to Cruz. Moreover, and significantly, Norma Edwards, although admitting that she authorized Cruz to hire a certain number of former A to Z employees to work for Respondent, did not deny making the above-described statements to Cruz, regarding her antiunion motivation, that appeared in his affidavit. Finally, Respondent never offered any convincing explanation as to why it decided to only hire six former A to Z employees, which is further corroboration of Cruz' affidavit. Accordingly, based on the foregoing, it is appropriate to rely on, and I have, portions of Cruz' affidavit to make my findings, set forth above. *Prestige Bedding*, supra; *Colonna's Shipyard*, supra.

Moreover, an even more compelling reason for relying on Cruz' affidavit is demonstrated by the record. During the period of time encompassed by the conversations between Edwards and Cruz, incorporated in Cruz' affidavit, Edwards had tentatively agreed with Cruz (subject to the working out of final details) that Respondent would be employing Cruz as its project manager as of July 3 when it commenced cleaning the facility. More significantly, Respondent admittedly delegated to Cruz the responsibility and authority to select the former A to Z employees whom Respondent would hire, and Cruz, in fact, made such a selection with which Respondent concurred. In these circumstances, Cruz was clearly an agent for Respondent certainly with respect to statements made with regard to hiring, although he was still employed by A to Z at the time in question. *American Press*, 280 NLRB 937, 941, 951 (1986); *Lemay Caring Center*, 280 NLRB 60, 61–70 (1986). Therefore, even apart from Section 804(b)(5) of the Federal Rules of Evidence, the statements of Cruz made in his affidavit constitute an admission against interest of Respondent, and are admissible and can be relied on that basis alone.

Accordingly, based on the foregoing, I have relied on the affidavit of Cruz (noting again that the statements in question were not denied by Edwards), in making my findings as set forth above, and to some extent below.[9]

On Monday, July 3, Respondent began work at the Federal building, performing some type of cleaning functions (although cleaning less space), with employees in classifications (except for a secretary), and working the same hours, as A to Z had performed at that location.

[7] I note that the Board's view in this area has not been accepted by at least two courts of appeal. See *NLRB v. United Sanitation Service*, 737 F.2d 936, 940, 941 (11th Cir. 1984); *Central Freight Lines v. NLRB*, 653 F.2d 1023, 1026 (5th Cir. 1981). I, of course, am bound to apply Board precedent. *Doral Building Services*, 266 NLRB 1215, 1217 (1983).

[8] I note that it is not clear whether exceptions were taken in *Doral*, supra to the administrative law judge's action in receiving these documents into evidence.

[9] In making my findings, I have considered the testimony of Bugg that Cruz ''had a habit of saying one thing and doing another,'' and ''he had a habit of playing both sides of the fence.'' Although this testimony may reflect to some extent on the truthfulness of Cruz' assertions in the affidavit, I conclude that Bugg's subjective and I would note somewhat ambiguous opinion about Cruz, is insufficient to discredit the statements in the affidavit, particularly in view of the corroboration of the significant portions of the affidavit by other evidence in the record.

On July 3, Norma and Alphonse Edwards arrived at the facility, along with 10 ''non A to Z employees'' to begin work. Of these 10 employees, 2 of them, Jesse White and Terrence Duncan, were new hires by Respondent, ''off the street,'' with no previous experience as a cleaner.[10] Another employee that Respondent selected was Alarice Thomas, who Respondent had employed as a secretary who had occasionally filled in as a substitute cleaner at Respondent's West Point job. Delores Bailey was transferred by Respondent from a housecleaning position. Four of the other employees utilized by Respondent were relatives of the Edwardses, who Respondent transferred over from other jobs of Respondent. Edwards admitted that Respondent had to replace Andre and Arnold Edwards with new employees at the other locations where these employees had been working prior to the transfer. Anthony Edwards, who is the son of Norma Edwards, was not employed by Respondent immediately prior to July 3, although he had done so in the past. He was a student at the time, and worked at the facility only until the end of the summer, when he returned to school.

On July 3, approximately 18 former A to Z employees appeared at the Federal building.[11] These employees arrived at various times throughout the morning.

Bugg was one of the first to arrive, and was told by a GSA security guard that A to Z employees would not be permitted to enter, except for six employees on a list, which had been left by Cruz. Bugg looked at the list and, although his name was on it, he decided to go outside and wait for Cruz. Shortly thereafter, Cruz arrived with a bag filled with the applications submitted by the former A to Z employees and told Bugg that nobody from Respondent had come to his house to pick up the applications.

Cruz went inside the facility, told Edwards that he was not going to work for Respondent under these conditions, particularly the reduced staffing, and he gave her the keys. Cruz came out and told the employees present that he was not going to work for Respondent, and it was best for the employees to stick with the Union, because ''things aren't right.''

Most of the employees present decided to enter the building and speak to Edwards. They were able to speak to Norma and Alphonse Edwards. The employees asked what was going on and why wasn't Respondent hiring the A to Z employees. Alphonse replied that he did not know who these people were, since they were not on his payroll. One employee asked Norma Edwards if she was going to take the Union. Edwards replied that the employees should see McCulloch. Some of the employees asked who is McCulloch. Edwards observed that the employees were lost, and didn't even know who their union representatives are. Norma Edwards added that she had ''done this before,'' was doing nothing illegal, and that they should go see their union representative.

N. Edwards then turned to Bugg and said to him that he had been hired by Respondent, and she couldn't understand why he wasn't staying. Bugg responded that ''it would be like turning my back on the union.'' Earline Bridgeman then identified herself as the appointed shop steward, and informed Edwards that Respondent must hire all the former A to Z employees present, or none of the employees would stay. Edwards replied that the Union cannot run her business, that if those employees whom she agreed to hire wanted to stay,[12] she had openings for them. The employees then left the premises, except for Bugg who went into the locker room to clean out his locker.

Norma Edwards approached Bugg and asked him again if he was staying. Bugg replied, ''no, he was not.'' Edwards stated that if Bugg did not stay, not to come back.

The above description of the events of July 3 is based on a compilation of the credible testimony of Bugg, Edwards, and to a limited extent, the affidavit of Cruz. While Bugg did not recall hearing Bridgeman tell Edwards that she was shop steward and that Respondent must hire all the former A to Z employees present, I have credited the testimony of Edwards to this effect. I note in that connection that Bridgeman was not called as a witness by General Counsel to deny making this statement. Moreover, this remark is consistent with the action taken by the four employees that Respondent had agreed to hire who were present that day. They refused Respondent's offer of employment, and Bugg admitted that he did not want to turn his back on the Union. Thus, I find it likely that Bridgeman made the remark attributed to her by Edwards, as set forth above.

After July 3, Edwards admitted that Respondent made payments into the pension and welfare funds of Local 355 on behalf of some of its employees employed at the Federal building, notwithstanding that it never recognized Local 355 as the collective-bargaining representative of its employees employed at that facility.

Several days after July 3, Bugg and employee Gonzalez went to the facility and asked Alphonse Edwards if Respondent was hiring. Edwards replied that he would check with his wife and get back to the employees. Respondent did not get back to either Bugg or Gonzalez.

However, subsequent to July 3, he continued to hire extensively in order to staff its operations at the facility. In fact, Norma Edwards admitted that Respondent thereafter hired everyone for whom it received an employment application except for the former A to Z employees, and six applicants for project manager. Between July 4 and 7, Respondent hired seven new employees, five of whom had no prior experience as cleaners or maintenance employees. Respondent continued to hire additional employees in late July and in August, including some with no previous cleaning experience, until reaching a level of 17 full-time and 4 part-time employees in August 1989.

On July 21, the Union filed the instant unfair labor practice charges. In late July, Sturm and Union Business Agent Poccio met outside the Federal building with former A to Z

[10] Norma Edwards concedes this to be the fact with respect to White, but contends that Duncan had worked for Respondent before as a cleaner, on a part-time basis. However, I do not credit Edwards' testimony in this regard, since Duncan's job application dated June 29, 1989, listed no previous experience as a cleaner, nor any prior service with Respondent.

[11] The employees were Bugg, Gonzalez, Benitez, Boyne, Montalbano, Ditonno, Colbert, Maldanado, Torres, Chillo, Zampella, Bridgeman, Hughes, Gorden, Hughes, Alzate, Carner, and Gomez.

[12] While N. Edwards testified that she had agreed to hire seven former A to Z employees, it appears that based on the record, the correct number was actually six. I note that Edwards could not recall the name of the seventh employee allegedly hired by Respondent and the unrefuted testimony of Bugg, corroborated by Cruz' affidavit, establishes that only six were on the list.

employees to establish a picket line. Sturm explained to the employees that they would be picketing to protest Respondent's unfair labor practices of refusing to hire the employees and refusing to recognize the Union. The employees picketed with signs reading ''WECO Cleaning, Inc. refuses to hire Local 32B-32J members.'' The word ''UNFAIR'' in capital letters also appears on the sign. The picketing continued until on or about October 6.

On October 6, Respondent mailed letters to all the former A to Z employees who had previously filed applications with Respondent for employment. The letters read that Respondent has a position for the employee at the Third Avenue facility, identical to their previous position. The letter asks that Respondent be contacted by phone within a week of receipt of the letter to make arrangements for their employment. Further, the letter adds that, ''If we do not hear from you within that period of time, we shall assume that you are not interested in this job.''

Norma Edwards admits that Respondent had no jobs available at the time for any of these employees but asserts that she sent the letters because she was expecting approval from GSA for Respondent to perform extra work which would necessitate the hiring of five additional employees. According to Edwards, as of the date of the trial, 3/30/90, such approval had not as yet been received from GSA.

A number of employees responded by phone to these letters, and a few others, who did not receive the letters because they had not filed applications originally, also called, since they heard about the letters from friends. Edwards told all the employees who called that they must report to Respondent's office at the Edwards home in Queens for an interview.

On October 18, the employees complied with Respondent's request and were interviewed by Edwards. She required each of them to fill out another job application and other papers. Edwards told the employees that she had no work for them now, but was waiting for GSA to approve her request for more space, at which time they would be contacted and called back to work.[13]

On October 10, Respondent hired an employee named Ralph Stevenson, and on October 16, Herbert Reilly, both as cleaners employed at the Federal building.

On October 18, Respondent hired Michael Montalbano, who was a former A to Z employee, and was hired by Respondent primarily because he was able to run a sweeper machine.

Respondent did not hire the other former A to Z employees who filled out the additional applications on October 18. However, on that same day, October 18, Respondent hired a Juan Gonzalez, a nonformer A to Z employee who had no prior experience as a cleaner.

The next day, October 19, Respondent hired another new employee and nonformer A to Z employee named Wilfredo Morales, as a cleaner, who also had no prior work experience in that position. On October 30, Respondent hired Tair Atillias as a cleaner at the facility. Additionally, on December 7, Respondent hired Anthony Felice, who had no prior cleaning experience, and on December 9 hired Lillian Miller, whose only prior experience was as a housecleaner.

Respondent's evidence consisted solely of the testimony of Alphonse and Norman Edwards with no documentary or other records produced. Alphonse Edwards testified that Respondent needed 17 employees at the Federal building and expected 7 to be chosen by Cruz. He further testified that Respondent brought 10 other employees with him, his son Anthony, and a friend Lorenzo who were college students and were hired ''just to help them out'' for college. Alphonse explained that Respondent needed more employees after July 3 when the former A to Z employees turned down Respondent's offer of employment. Thus, they continued to hire people in July and August, some without experience, and some only on a part-time basis. Alphonse asserted initially that Respondent did not try to contact the former A to Z employees during this period of time because the employees had refused to work unless everyone was hired.

However, notwithstanding this belief, Alphonse further asserts that he did make several attempts to contact certain former A to Z employees to offer them jobs, but they refused the offer. He could not recall any names of these employees who allegedly refused Respondent's offer on the phone. According to Edwards, sometime in July, he offered a position to Sal Zampella, who had been recommended by an official of the Coast Guard, where Zampella was working at the time. Zampella allegedly refused the offer of Edwards to come to work for Respondent. Alphonse also testified that in October, Maldanado in response to the October letter, came in and asked if she was being offered her old job as a secretary. Edwards replied no, but he could hire her as a cleaner. Maldanado allegedly refused that offer. In this connection, Norma Edwards testified that employee Henry Carner was called by her husband and a message was left on Carner's machine to call about a job. Allegedly Carner did not respond. She also testified that she called Kypri in October to offer him a position, but no one answered his phone.

Neither Alphonse nor Norma Edwards testified as to how Respondent came to the decision to hire only 6 or 7 employees from A to Z and 10 from other sources, including some from ''off the street.'' They also did not testify that they received any information from Cruz or anyone from A to Z or otherwise, critical of any of the former A to Z employees.

Maria Benitez admitted that while employed at A to Z, she had been warned by Cruz about her attendance problems, and at one point had been terminated by Respondent for attendance reasons, but was taken back after the Union filed an arbitration request on her behalf. Additionally, the record revealed a large number of latenesses and/or absences for Benitez during the period of March through May. However, Respondent adduced no testimony or other evidence that it did not hire Benitez because of any attendance problems that she may have had while employed at A to Z, or for any other reasons. Indeed, Respondent adduced no testimony detailing any reason why it refused to hire any specific employee formerly employed by A to Z. In fact as noted, Respondent conceded that it left that decision to Cruz, after giving him the number of A to Z employees that it wished to hire. As noted above, Edwards conceded that they did not have, nor did they review, the employment applications that the A to Z employees had filed, prior to July 3, the day Respondent began operations at the Federal building.

[13] The former A to Z employees who filed employment applications, dated October 18 were Alzate, Benitez, Boyne, Bridgeman, Bugg, Carner, Chillo, Colbert, Gomez, Gonzalez, Hughes, McGinley, Minier, Torres, and Zampella.

III. ANALYSIS

A. *The Alleged Refusal to Hire*

It is clear that a new owner of a business or a successor contractor, like Respondent, is not obligated to hire all or even any of the employees employed by the predecessor contractor. However, it may not refuse to hire the predecessor's employees because they were represented by a union or to avoid having to recognize and/or bargain with the Union. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Howard Johnson's v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974). Some of the factors relied on by the Board in establishing such a violation include evidence of union animus; lack of a convincing rationale for the refusal to hire the predecessor's employees, inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner or contractor conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine. *U.S. Marine Corp*., 293 NLRB 669 (1989), citing *Houston Distribution Service*, 227 NLRB 960 (1977); *Lemay Caring Centers*, 280 NLRB 60 (1986), enfd. mem. 815 F.2d 71 (9th Cir. 1987). As in *U.S. Marine*, supra, I conclude that all these factors are present here.

Thus, Respondent was first notified about the Union's presence in December 1988, even before it was officially appointed as the successor contractor for the Federal building cleaning services. At that time, it agreed to meet with union officials and did so. At that meeting, Respondent's officials indicated satisfaction with the predecessor's employees and promised to maintain wages and benefits. However, when Respondent indicated that the current staffing level might have to be reduced, the Union indicated that written permission from the Union would be required for such a reduction, and advised Respondent not to bid for the job on the basis of reduced staffing.

It is obvious that as a result of the Union's position at that meeting, Respondent was no longer interested in dealing with the Union as the representative of the employees at the facility. It is also obvious, that from that time on Respondent was determined not to recognize the Union, and I concluded made its hiring decisions based on a plan to avoid hiring a majority of former A to Z employees who were represented by the Union.

The unlawful motivation is compelling established by statements made to Cruz by Norma Edwards, which Cruz in return reported to several employees. These statements to the effect that Respondent intended to hire only six employees from A to Z in order to get rid of Local 32B-32J, and that Respondent had done this before provides significant evidence of discriminatory intent. Cruz elaborated further in his statement to Bugg that Respondent would bring in seven or eight of her own employees, and that ''her'' employees would vote for Local 355 and outvote the Local 32B-32J supporters from A to Z.[14]

Respondent's conduct in staffing its operations at the facility, is further demonstrative of its discriminatory intent. Thus, while it was notified on June 7 that it was to take over on July 3, Respondent did not notify the Union as it had promised to do. When the Union found out independently, McCulloch called Edwards on June 27, and requested that Respondent hire the A to Z employees.[15] Edwards, obviously somewhat flustered by McCulloch's request, suddenly concluded that she would require applications from the A to Z employees, although as noted, she had already instructed Cruz to select only six A to Z workers to be hired. Respondent then went through the motions of distributing applications to the A to Z employees, notwithstanding the fact that Cruz had already decided on the six employees to be chosen. Indeed, Respondent's officials never even bothered to pick up the completed applications of the A to Z employees from Cruz as promised, and did not receive them until the date it commenced operations, and when its initial staff had already been notified of their selection.

Moreover, Respondent admits that it was impressed with the performance of the A to Z employees in terms of their ability to clean the facility, and it told McCulloch in December 1988 that ''it had no problems with the employees'' and intended to hire these employees, although it would not need all of them. Respondent also admits that it had only a short time to compile its initial staff, that it was operating under an interim contract, and was anxious to show that it was doing good. Thus, it would be logical, and I find quite likely, that employers in such a situation would fill its staff with an experienced and well regarded crew of employees who are already at the facility, and are familiar with the operations. I find the record convincingly establishes that Respondent would have done precisely that, had the Union not previously expressed opposition to her intention to reduce staff, thereby persuading Respondent that it would not recognize the Union, as the representative of its employees at the facility.

Respondent is not legally obligated to hire all the former A to Z employees, nor to fill its entire staff with former A to Z workers. Nor is it precluded from having others to work at the new facility. However, what it may not do, as noted, is to refuse to hire employees to avoid having to recognize the Union. *U.S. Marine*, supra. Therefore, in view of the compelling prima facie case, detailed above, of discriminatory intent by Respondent, it has the burden of establishing that it would not have hired the former A to Z employees absent their union affiliation. *NLRB v. Transportation Management Co*., 462 U.S. 393 (1983). *American Cleaning Co*., 291 NLRB 399 (1988). Respondent has fallen far short of meeting its burden in this regard.

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[14] This statement by Cruz to Bugg, as well as the other statements of Cruz to employees, are admissions against Respondent, since as noted above, Cruz was Respondent's agent, at least for the purpose of statements made about hiring. Thus, Respondent having placed Cruz in a position to be involved in hiring of its employees, to discuss it with A to Z employees, and to give out and receive employment applications from them, is responsible for Cruz' statements to employees about such hiring. *American Press*, supra. While Cruz is deceased, and testimony of witnesses concerning his conduct must be weighed with great scrutiny, *Colonna's Shipyard*, supra, I have done so, and find such testimony to be sufficiently corroborated by the record. See also *City Wide Ambulette, Inc*., 272 NLRB 882, 884 (1984).

[15] McCulloch's request is a sufficient application for hire on behalf of all A to Z employees. *Harvard Industries*, 294 NLRB 1102 (1989).

Respondent has supplied no convincing rationale for its refusal to hire more than six former A to Z employees. *Southwest Merchandising Corp*., 296 NLRB 1001 (1989); *U.S. Marine*, supra. The only evidence presented of an work-related difficulties with respect to any of the A to Z employees, was the admissions of Benitez that she experienced lateness and absence problems while at A to Z, including an attempt by A to Z to terminate her. However, Respondent adduced no evidence that these transgressions of Benitez played any role in Respondent's decision not to hire her. Indeed, Respondent did not establish that it was aware of these problems of Benitez, or in fact that it was aware of any problems with the performance of any of the A to Z employees, when it decided to hire only six of these employees, of whom Respondent had initially expressed its willingness to hire, and had expressed admiration for their cleaning ability.

Further, Respondent furnished no convincing explanation as to why it chose to hire the 10 non-A to Z employees, whom it originally chose to be part of its initial staff at the facility. I note that these 10 employees included 2 employees hired ''off the street,'' with no previous cleaning experience, 1 who was employed by Respondent as a secretary, and 2 students, who Respondent knew would be leaving at the end of the summer.

Subsequently to July 3, Respondent continued to hire numerous employees to fill out its staff, to replace the A to Z employees who refused hire, as well as to account for the significant turnover experienced by Respondent. A number of these new hires, included employees with no previous maintenance experience. Yet no further A to Z employee was hired by Respondent until October 18, when it hired Montalbano primarily because he was able to operate a sweeper machine.

Respondent argues and its officials testify that it did not hire former A to Z employees subsequent to July 3 because those whom it did hire on July 3 refused to work unless Respondent hired everyone, plus the statement of employee Bridgeman that no one would work for Respondent unless it hired all the A to Z employees present. However, I do not find this contention persuasive. I note that a few days after July 3, employees Bugg and Gonzalez came to the facility and asked Alphonse Edwards if Respondent was hiring. While Edwards promised to check with his wife and get back to these two employees, he did not do so, notwithstanding the fact as noted that it was continuing to hire inexperienced people during this period of time.

Respondent's October 6 letters, purporting to offer reinstatement to employees, when in fact it had no jobs available, was in my view a clumsy attempt to cut off backpay, was not made in good faith, and is further demonstrative of its discriminatory practices. Respondent not only did not have any jobs available for these employees, but forced them to come to Norma Edwards' home to fill out new applications, although Respondent already had applications on file for these employees.

While much to Respondent's probable chagrin, most of the former A to Z employees complied with these unnecessary conditions and filled out new applications, Respondent continued its refusal to hire any of them. While Edwards claimed no jobs were available for these employees, and she was awaiting GSA approval for more work, I note that Respondent hired two non-A to Z employees on October 10 (4 days after the letters were sent to the employees), and two more nonformer A to Z employees, with no previous experience, on October 18 and 19, respectively, at the same time it was telling the former A to Z employees that it had no jobs for them. Further on October 30, December 7 and 9, it again hired inexperienced nonformer A to Zemployees, without offering jobs to any of the experienced former A to Z employees for whom it had twice received job applications.

Accordingly, I conclude that Respondent engaged in a hiring scheme (both before and after July 3) designed to exclude former A to Z employees from its work force, in order to prevent such employees from comprising a majority of its employees. *Southwest Merchandising*, supra; *U.S. Marine*, supra.

While I again note that Respondent is not legally obligated to hire its entire force from former A to Z employees, where as here, it has discriminated in such hiring, any ambiguity as to how many employees would have been hired, absent such discrimination, must be resolved against the wrongdoer. ''Thus, when a successor has discriminated in hiring, it can be inferred that substantially all the former employees would have been retained absent the unlawful discrimination.'' *American Press*, supra at 938, citing *Love's Barbecue Restaurant*, 245 NLRB 78 (1978). Here, Respondent's initial complement as testified to by its witnesses was 17 employees. Thus, once former A to Z employees declined employment, these 6 positions plus the other 11 could have been filled by former A to Z employees. Therefore, there were sufficient jobs available for all the 15 discriminatees alleged in the complaint. C.f. *Hubacher Cadillac*, 262 NLRB 1062 (1983), enfd. 760 F.2d 275 (9th Cir. 1985).

Therefore, based on the foregoing, I conclude that Respondent has refused to hire the former A to Z employees, as alleged in the complaint, as part of its plan to avoid an obligation to recognize and bargain with the Union, and has thereby violated Section 8(a)(1) and (3) of the Act. *U.S. Marine*, supra; *State Distributing Co*., 282 NLRB 1048, 1058 (1987); *Harvard Industries*, supra.

B. *The Alleged Refusal to Bargain*

The record demonstrates clearly that but for Respondent's refusal to hire a majority of its work force from former A to Z employees represented by the Union, all the other elements of successorship are present. Thus, Respondent is performing the same work (although not the same amount) previously performed by A to Z, for the same customer at the same location, with the same basic work schedule and job classifications. Moreover, Respondent replaced A to Z with no hiatus.

Since, but for the discriminatory refusal by Respondent to hire the former A to Z employees, there would have heen a continuity of employees from the A to Z to Respondent, a finding that Respondent is a successor to A to Z at the Third Avenue facility is appropriate. Thus, Respondent has violated Section 8(a)(1) and (5) by refusing to recognize and bargain with Local 32B-32J. *Harvard Industries*, supra; *American Press*, supra at 937; *State Distributing*, at 1048.

Given the unlawful refusal to hire the former A to Z employees, plus the unlawful refusal to bargain with the Union, the decision of employee Tyrone Bugg to refuse to work on July 3, and thereafter to subsequently engage in picketing on

behalf of the Union, affords Bugg the status of an unfair labor practice striker. *Harvard Industries*, supra.

Therefore, Respondent's action in refusing to reinstate Bugg on October 18, when he offered to return to work, constitutes an additional violation of Section 8(a)(1) and (3) of the Act. The complaint as amended also alleges that employees Torres and Minier were also unfair labor practice strikers, as well as unlawfully denied reinstatement on October 18. I do not agree. The evidence discloses that Minier and Torres both informed Cruz prior to July 3, that they did not wish to accept Respondent's offer of employment for reasons unrelated to any unlawful activity of Respondent. Thus, since they cannot be construed as unfair labor practice strikers, Respondent has not violated the Act by refusing to reinstate them on and after October 18.[16]

While under *Burns*, supra, a successor employer is ordinarily free to set initial terms of employment without bargaining with the incumbent union, when an employer discriminates in refusing to hire a majority of the predecessor's employees, it can be inferred that substantially all the former employees would have been retained absent the discrimination. *American Press*, supra at 938; *Love's Barbecue*, supra at 82. In such circumstances, an employer cannot set initial terms of employment without consultation with the union. *U.S. Marine*, supra; *State Distributing Co*., supra at 1048; *Harvard Industries*, supra.

Having concluded that Respondent has violated Section 8(a)(1) and (3) by refusing to hire the former A to Z employees, and that absent such discrimination, substantially all these employees would have been retained, Respondent was not entitled to set initial terms of employment without first consulting with the Union.

Accordingly, I conclude that Respondent has unilaterlly changed terms and conditions of employment, by departing from established terms and conditions of employment of the former A to Z employees as reflected in the collective-bargaining agreement between A to Z and the Union in violation of Section 8(a)(1) and (5) of the Act. *State Distributing Co*., supra; *U.S. Marine*, supra; *American Press*, supra.

C. *The Alleged Unlawful Assistance*

It is conceded that on and after July 3, Respondent made pension and health and welfare contributions to Amalgamated Local 355 funds on behalf of certain of its employees employed at the Federal building, notwithstanding that it had not recognized Local 355 as the collective-bargaining representative of such employees.

In the absence of a lawful collective-bargaining agreement covering such employees, such conduct by Respondent constitutes blatantly unlawful assistance to Local 355, and is violative of Section 8(a)(1) and (2) of the Act. I so find. *Reliable Trailer & Body*, 295 NLRB 1013 (1989); *Harbor Cartage, Inc*., 269 NLRB 927, 928 (1984); *Banff, Ltd*., 197 NLRB 805 (1972); see also *Russell Motors*, 198 NLRB 351, 330–371 (1972).

[16] I note that General Counsel makes no reference in his brief to either Minier or Torres as unfair labor practice strikers, while urging such a finding as to Bugg.

CONCLUSIONS OF LAW

1. The Respondent, Weco Cleaning Specialists, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Local 32B-32J, Service Employees International Union, AFL–CIO and Amalgamated Local Union 355 are labor organizations within the meaning of Section 2(5) of the Act.
3. All service employees employed by Respondent at the Third Avenue facility in Brooklyn, New York, excluding all guards and supervisors within the meaning of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. Since on or about July 3, 1989, Local 32B-32J has been the exclusive representative of the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
5. By refusing to hire employees formerly employed by its predecessor A to Z Maintenance Corp., because the employees were represented by Local 32B-32J, and in order to avoid reorganizing and bargaining with Local 32B-32J, has violated Section 8(a)(1) and (3) of the Act.
6. By refusing to recognize and bargain with Local 32B-32J as the collective-bargaining representative of its employees employed in the aforesaid unit, Respondent has violated Section 8(a)(1) and (5) of the Act.
7. By departing from preexisting conditions of employment of its employees without prior notification to and bargaining with Local 32B-32J, Respondent has violated Section 8(a)(1) and (5) of the Act.
8. The strike engaged in by employee Tyrone Bugg was an unfair labor strike, caused by the unfair labor practices of Respondent described above.
9. By refusing to reinstate Tyrone Bugg on his unconditional application to return to work on October 18, 1989, Respondent has violated Section 8(a)(1) and (3) of the Act.
10. By making payments into the pension and welfare funds of Amalgamated Local 355, on behalf of its employees, notwithstanding the fact that Local 355 did not represent an uncoerced majority of employees in the aforesaid bargaining unit, Respondent has violated Section 8(a)(1) and (2) of the Act.
11. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1), (2), (3), and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

I shall recommend that Respondent offer to the unit employees formerly employed by A to Z Maintenance to whom it did not offer employment, including those listed below, immediate and full employment, without prejudice to their seniority and other rights previously enjoyed, discharging if necessary any employees hired in their place.

Guiomar Alzate	Elizabeth Gorden
John Boyne	Arnie Hughes
Earline Bridgeman	Ruben Gonzalez
Michelle Chillo	Martha Benitez

Willie Colbert	Frank Olivieri
Henry Garner	Sal Zampella
Joseph Ditonno	Tyrone Bugg
Luis Gomez	

I shall also recommend that Respondent make whole the above-named employees, plus Mike Montalbano,[17] for any loss of earnings and benefits they may have suffered by reason of Respondent's unlawful refusal to employ them. The backpay period of all discriminatees but Tyrone Bugg shall commence on July 3, 1989, and Bugg's backpay commences on October 18. Backpay shall be computed as in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I note in connection with my recommended reinstatement and backpay order as detailed above, that the record does disclose some evidence that Respondent may have made offers of reinstatement to Sal Zampella and/or some other employees. Since the record is incomplete with respect to these matters, I shall leave to the compliance stage of this case, the resolution of those issues.

Additionally, I would note that the record is incomplete with respect to the status of employee Frank Olivieri. Testimony in the record indicates that he was either on disability or retired at the time of the union request that Respondent hire the former A to Z employees. Moreover, although the record contains no testimony as to the following, Respondent's brief asserts that Olivieri was in fact one of the original group of employees whom Respondent intended to hire on July 3. Since the record as to Olivieri is so incomplete and inconsistent, I shall leave his status as a discriminatee and entitlement to any remedial relief, also to the compliance stage of the proceeding.

I shall also recommend that Respondent be ordered to recognize and on request bargain collectively with Local 32B-32J with respect to the employees in the appropriate unit, and, if agreement is reached to reduce the agreement to a written contract. Additionally, Respondent shall be ordered to rescind any departures from terms and conditions of employment that existed immediately before Respondent's takeover from A to Z Maintenance Company of the cleaning service operation at the Third Avenue facility, and to retroactively restore preexisting terms and conditions of employment, including wage rates[18] and benefits that would have been paid absent such unilateral changes from July 3, 1989, until Respondent negotiates in good faith with Local 32B-32J or to impasse. The remission of wages shall be computed as in *Ogle Protection Service*, 182 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, supra. Respondent shall also remit all payments it owes to the employee benefit funds and reimburse its employees for any expenses resulting from the failure to make these payments in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Any amounts that Respondent must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co*., 240 NLRB 1213 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Weco Cleaning Specialists, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with Local 32B-32J Service Employees International Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All service employees employed by Respondent at the Third Avenue Facility in Brooklyn, New York, excluding all guards and supervisors within the meaning of the Act.

(b) Unilaterally changing wages, hours, pension and welfare contributions, or any other term and condition of employment of its employees in the above unit, without notifying and bargaining with Local 32B-32J.

(c) Making payments into the pension and welfare funds of Amalgamated Local Union 355, on behalf of its employees in the above unit.

(d) Refusing to hire or otherwise discriminating against employees, because of their membership in Local 32B-32J or to avoid recognizing and bargaining with Local 32B-32J.

(e) Refusing to reinstate unfair labor practice strikers.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize, and on request bargain collectively with Local 32B-32J as the exclusive representative of its employees in the above-described unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

(b) Rescind any departures from terms and conditions of employment that existed immediately before its takeover from A to Z Maintenance Company of the cleaning service operation at the Third Avenue facility, and retroactively restore preexisting terms and conditions of employment, including wage rates and benefit plans, and make the employees whole by remitting all wages and benefits that would have been paid absent such unilateral changes from July 3, 1989, until it negotiates in good faith with the Union to agreement or to impasse, in the manner set forth in the remedy section of this decision.

(c) Offer to unit employees formerly employed by A to Z Maintenance to whom it did not offer employment, including those listed below, immediate and full employment, without prejudice to their seniority and other rights previously en-

[17] As noted, Montalbano accepted a position with Respondent on October 18, so no reinstatement order with respect to him is warranted.

[18] The record does not disclose whether Respondent made any changes in wages. Thus, it will be necessary to resolve this issue at the compliance stage as well.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

joyed, discharging if necessary any employees hired in their place.

Guiomar Alzate	Elizabeth Gorden
John Boyne	Arnie Hughes
Earline Bridgeman	Ruben Gonzalez
Michelle Chillo	Martha Benitez
Willie Colbert	Frank Olivieri
Henry Garner	Sal Zampella
Joseph Ditonno	Tyrone Bugg
Luis Gomez	

(d) Make whole the above-named employees, plus employee Michael Montalbano for any loss of earnings and benefits they may have suffered by reason of Respondent's discrimination against them, as described in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Brooklyn, New York facility copies of the attached notice marked ''Appendix.''[20] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with Local 32B-32J Service Employees International Union, AFL–CIO as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All service employees employed by Respondent at the Third Avenue Facility in Brooklyn, New York, excluding all guards and supervisors within the meaning of the Act.

WE WILL NOT unilaterally change wages, hours, pension and welfare contributions, or any other term and condition of employment of our employees in the above unit, without notifying and bargaining with Local 32B-32J.

WE WILL NOT make payments into the pension and welfare funds of Amalgamated Local Union 355 on behalf of our employees in the above unit.

WE WILL NOT refuse to reinstate unfair labor practice strikers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize, and on request, bargain collectively with Local 32B-32J as the exclusive representative of employees in the above-described unit, with respect to rates of pay, wages, hours and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

WE WILL rescind any departures from terms and conditions of employment that existed immediately before our takeover from A to Z Maintenance Co. of the cleaning service operation at the Third Avenue facility, retroactively restore preexisting terms and conditions of employment, including wage rates and benefit plans, and make the employees whole by remitting all wages and benefits that would have been paid absent such unilateral changes from July 3, 1989, until we negotiate in good faith with the Union to agreement or to impasse, plus interest.

WE WILL offer to unit employees formerly employed by A to Z Maintenance to whom we did not offer employment, including those listed below, immediate and full employment, without prejudice to their seniority and other rights previously enjoyed, discharging if necessary any employees hired in their place.

Guiomar Alzate	Elizabeth Gorden
John Boyne	Arnie Hughes
Earline Bridgeman	Ruben Gonzalez
Michelle Chillo	Martha Benitez
Willie Colbert	Frank Olivieri
Henry Garner	Sal Zampella
Joseph Ditonno	Tyrone Bugg
Luis Gomez	

WE WILL make whole the above-named employees, plus employee Michael Montalbano for any loss of earnings, and benefits they may have suffered by reason of our discrimination against them, plus interest.

WECO CLEANING SPECIALISTS, INC.